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No. 87-953

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

CHRISTINA KONIZESKI, ET AL.

v.

LIVERMORE LABS, ET AL.

ALICE P. BROUDY

v.

UNITED STATES OF AMERICA

ON PETITION FOR
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE COMMITTEE OF ATOMIC BOMB SURVIVORS AND FRIENDS OF HIBAKUSHA IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

		PAGE
STATEMENT OF INTEREST		1
INTRODUCTION		3
ARGUMENT		11
I.	THE MODERN SOVEREIGN IMMUNITY DOCTRINE IS INCONSISTENT WITH BOTH ITS HISTORICAL ORIGINS AND OUR NATION'S UNDERLYING DEMOCRATIC PRINCIPLES	11
II.	THE LOWER COURTS' APPLICATION OF THE DISCRETIONARY FUNCTION EXCEPTION IS INCONSISTENT WITH ITS INTENDED PURPOSES. PROPERLY CONSTRUED, THE EXCEPTION WOULD NOT IMMUNIZE THE ALLEGED GOVERNMENTAL NEGLIGENCE IN THIS CASE	18
III.	THE UNITED NATIONS' UNIVERSAL DECLARATION OF HUMAN RIGHTS OBLIGATES THE UNITED STATES TO COMPENSATE THE VICTIMS OF RADIATION EXPOSURE IN OUR NUCLEAR WEAPONS TESTING PROGRAMS	32
CONCLUSION		40

TABLE OF AUTHORITIES

CASES	PAGE
Barr v. Mateo, 360 U.S. 564 (1959)	25
Berkovitz v. United States, 822 F.2d 1322 (3d Cir. 1987), cert. granted, 56 U.S.L.W. 3459 (Jan. 11, 1988) (No. 87-498)	26, 27, 28
Dalehite v. United States, 346 U.S. 15 (1953)	9, 19, 20, 21, 22, 27
Doe v. McMillan, 412 U.S. 306 (1973)	25
The Paquette Habana, 175 U.S. 677 (1900)	33
Pawlett v. Attorney General, Hadres 465, 145 Eng. Rep. 550 (1668)	14, 15
Reid v. Covert, 354 U.S. 1 (1957)	32
Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983)	12
Soriano v. United States, 352 U.S. 270 (1957)	12, 13
United States v. Brandt (The Medical Case), 2 Trials of War Criminals Before The Nuremberg Military Tribunals Under Control Council Law No. 10 (1949)	30, 31

PAGE

United States v. Mitchell, 445 U.S. 535 (1980) — 12, 13

United States v. S.A. Empress De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797 (1984) — 9, 19, 20, 22, 23, 27, 29

United States v. Sherwood, 312 U.S. 584 (1941) — 13

United States v. Stanley, 483 U.S. ___, 97 L.Ed.2d 550 (1987) — 31

Westfall v. Erwin, ___ U.S. ___ (1988) — 17, 24, 25 26, 29

Whitney v. Robertson, 124 U.S. 190 (1888) — 32

CONSTITUTION, TREATIES STATUTES AND DECLARATIONS

United States Constitution Article VI, ¶2 — 32

28 U.S.C. §2674 — 18, 19
§2860(a) — 8, 19

Universal Declaration of Human Rights — 34, 36, 37

PAGE

Exchange of Notes Constituting An Agreement Between The United States of America and Japan Relating to The Settlement of Personal and Property Damages Resulting From Nuclear Tests in The Marshall Islands in 1954, United Nations-Treaty Series 198 (1955) 38, 39

SUPPLEMENTAL AUTHORITIES

Bouchard, Government Liability In Tort, 34 Yale L.J. 1 (1924) 15, 16, 17

Henkin, The Constitution and United States Sovereignty: A Century Of Chinese Exclusion And Its Progeny, 100 Harv. L. Rev. 853 (1987) 33, 37

Holdsworth, The History of Remedies Against The Crown, 38 L.Q. Rev. 141 (1922) 13, 14, 15, 16

Humphrey, The International Bill of Rights: Scope and Implementation, 17 Wm. & Mary L.Rev. 527 (1976) 35, 36

Lillich, The Role of Domestic Courts In Enforcing International Human Rights Law, Guide to International Human Rights Practice (U. of Pa Press 1984) 34

PAGE

Park, Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation, 34 UCLA L.Rev. 1195 (1987) 35, 37

Sohn, The New International Law: Protection of the Rights of Individuals Rather Than States, 32 Am. U. L.Rev. 1 (1982) 34, 35

STATEMENT OF INTEREST

The Committee of Atomic Bomb Survivors ("CABS") is a California nonprofit corporation formed in 1972 to provide mutual support for the more than 1,000 American survivors of the Hiroshima and Nagasaki atomic bombings ("hibakusha"). Most of the survivors either were Americans trapped by the outbreak of World War II while visiting relatives or going to school in Japan or were Japanese citizens who married American servicemen after the war. Most American hibakusha are women and virtually all were still children (the youngest were in utero) when the bombs fell, engulfing the cities of Hiroshima and Nagasaki in a nightmare of fire and destruction. Most of CABS' efforts have focused on obtaining medical assistance for its members (the hibakusha receive no assistance from our government

for their extraordinary injuries) and participation in public education about the devastating consequences of nuclear war.

Friends of Hibakusha ("FOH") is a California nonprofit public benefit corporation created in 1981 to provide support to the American hibakusha, to preserve their legacy to humanity and to educate the public about the horrors of nuclear war. FOH is involved in educational projects for adults and children in the San Francisco Bay Area and also helps arrange for medical assistance to the hibakusha, including the coordination of a biennial visit of a delegation of Japanese doctors from Hiroshima, sponsored by the Japanese government, to perform free medical examinations for the hibakusha.

Both CABS and FOH are vitally interested in the issue of governmental responsibility for the victims of radiation exposure. Because of their deeply traumatic experiences with nuclear warfare, the hibakusha feel a strong kinship with and support for all such victims. CABS and FOH strongly believe that all persons subjected to intentional or negligent exposure to nuclear radiation should be entitled to compensation for their resulting injuries.

INTRODUCTION

CABS and FOH respectfully submit that the advent of the nuclear age has fundamentally changed the world in which we live and, in particular, the approach nations must adopt in shaping public policy. As a result of the atomic bombings of Hiroshima and Nagasaki on August 6 and 9, 1945, nations must now

confront a new set of legal and political assumptions unforeseen before the advent of nuclear war. Indeed, the urgency of this task is far greater now than ever before since the combined nuclear arsenals of the superpowers dwarf the destructive power of the first atomic bombs as much as they, in their time, dwarfed the destructive power of conventional explosives. We are faced each day with the awful political and personal consequences of the dilemma we have created for ourselves.

Japan in particular has responded to the challenge of reexamining its responsibilities in view of the dangers to civilization posed by nuclear warfare and has accepted the enhanced duties which all nations, including and especially the major nations, must bear in the nuclear age. In particular, recognizing the

magnitude of the injuries suffered by those exposed to the Hiroshima and Nagasaki nuclear bombs, Japan provides a comprehensive program of medical care to all survivors of the bombings, although the American hibakusha must provide their own transportation to Japan in order to receive this treatment. As a result, Japan maintains research centers and an unequalled store of information on the effects of radiation exposure to which even the USSR turned for assistance after the Chernobyl disaster. CABS and FOH believe that the essential issue presented to our nation by the petitioners' case is the need to similarly recognize and accept the responsibilities attendant upon a major nation in the nuclear age.

As living witnesses to the holocaust of nuclear warfare, the hibakusha know

the terrible reality of the threat of global annihilation and immeasurable human suffering that is posed by modern nuclear weapons. In a profound and direct way, the hibakusha bear witness to this reality for all of us, making human and personal a debate that is most often shrouded in technical and abstract jargon. The hibakusha who miraculously survived the atomic explosions or who searched the devastated cities for their families, friends and loved ones experienced a hell on earth beyond most of our powers to imagine. It is from their vantage point as the first survivors of nuclear war between nations that the hibakusha appear here to address the issue of sovereign and discretionary immunity the government claims absolves it of responsibility for the peacetime

injuries inflicted upon the petitioners in this case.

The petitioners have explained to this Court how, following World War II, the United States conducted a series of atomic and hydrogen bomb tests which exposed an appalling number of Americans, who were entirely ignorant of the risks to which they were subject, to massive doses of nuclear radiation. Most have since died from cancers triggered by this exposure. In our view, the essential challenge to our country is to recognize the government's responsibility for these peacetime casualties of the cold war. However, although responsibility for the political decisions leading to those injuries may be among the most important questions our nation must face, petitioners have not sought to assign liability on this ground. Rather, consis-

tent with well settled common law principles, petitioners charge the private contractors and the government with liability for the negligence, indeed gross negligence, of the individuals responsible for the mandatory details of the implementation of the testing program.

Although none of the underlying purposes of the immunities the government asserts would be affected in the least by the imposition of liability and responsibility for the human suffering caused by the contractors' and government's negligence, the district court held that all activity in the course of the nuclear weapons testing program was protected by the discretionary function exception established by the Federal Tort Claims Act, 28 U.S.C. §2860(a). 616 F. Supp. 759 (N.D. Cal. 1985). Adopting the

district court's decision as its own, the Ninth Circuit affirmed the judgment of dismissal. 820 F. 2d 982 (9th Cir. 1987).

Amici recognize that this Court has given a broad reading to the discretionary function immunity under the Tort Claims Act. United States v. S.A. Empress De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797 (1984) ("Varig"); Dalehite v. United States, 346 U.S. 15 (1953). In this case, however, the lower courts have immunized the government from liability for actions which stand far outside the limited protection this Court has recognized the discretionary function exception was intended to afford to the government's basic economic, political and social policy choices. By this brief, CABS and FOH respectfully suggest that the lower

courts' broad reading of the discretionary function exception is supported neither by its underlying purpose, as articulated by this Court's decisions, nor the democratic principles underlying our republic. Furthermore, the extent of the immunity afforded to the government by the lower courts' decisions is inconsistent with the protections afforded by the accepted norms of international law.

Accordingly, on these grounds, amici urge this court to grant certiorari in this exceedingly important case in order to correct the excessively broad reading the lower courts have given the discretionary function immunity. The negligent failure to establish and implement safe radiation exposure levels caused widespread suffering and death to those who were attempting to serve their country extraordinarily. Failing to take

responsibility for that suffering diminishes the principles and values underlying our belief in the people as sovereign. The far reaching immunization of the government conferred by the lower courts in this case was neither intended by Congress nor permissable under international law.

ARGUMENT

I. THE MODERN SOVEREIGN IMMUNITY DOCTRINE IS INCONSISTENT WITH BOTH ITS HISTORICAL ORIGINS AND OUR NATION'S UNDERLYING DEMOCRATIC PRINCIPLES.

The discretinary function exception derives in part from the underlying historical doctrine of sovereign immunity and cannot be understood apart from that context. Examination of its historical origins, however, reveals that, even in feudal England, the doctrine did not prevent relief against the Crown. Amici respectfully suggest that our modern

doctrine should be no less rigid in affording relief against the government.

By definition, the sovereign immunity doctrine protects the government from liability for injuries caused by its conduct even if a private person could be held liable for the same conduct. Unfortunately, modern courts have rigidly enforced the doctrine regardless of the acknowledged harshness which may result. Soriano v. United States, 352 U.S. 270, 276-277 (1957). This Court has repeatedly emphasized that the government may be sued only by its consent through an express and unequivocal waiver of its sovereign immunity. A waiver will not be implied and the terms of any such waiver will be strictly and narrowly construed in favor of the government. See Ruckelshaus v. Sierra Club, 463 U.S. 680, 686 (1983); United States v. Mitchell,

445 U.S. 535, 538 (1980); Soriano, 352 U.S. at 276; United States v. Sherwood, 312 U.S. 584, 586 (1941).

Ironically, the original medieval form of the doctrine did not produce the harsh results it does in our modern democracy. To the contrary, the doctrine allowed relief against the Crown in virtually all cases in which relief would have been available against a private person. See Holdsworth, **The History of Remedies Against the Crown**, 38 L.Q. Rev. 141, 142-143 (1922). While not subject to suit in his own courts, "the King was subject to the law . . . and was morally bound to do the same justice to his subjects as they could be compelled to do to one another." Id. at 144. Although addressed to its royal prerogative, the Crown could not properly deny a "petition of right" because it was, by definition,

based on legal claims recognized among the Crown's subjects. Id. at 148-150. As Holdsworth has observed:

> "To a petition of right there must always be a reply: 'Let right be done,' . . . [T]hough the King could rightfully refuse to grant a petition of grace, he could not rightfully refuse to do what justice required when judgment had been got on a petition of right." Id. at 149.

Significantly, throughout its history the petition remained a flexible remedy against the Crown whose scope evolved with the changing concepts of legal right based on "the principle that it ought to lie whenever the subject could show a legal right to redress." Id. at 148, 156, 163, 288. As Lord Atkins observed in Pawlett v. Attorney General, Hadres 465, 145 Eng. Rep. 550, 552 (1668):

> "The party ought to be relieved against the King, because the King is the

> fountain and head of justice and equity; and it shall not be presumed that he will be defective in either. And it would derogate from the King's honour to imagine that what was equity against a common person, should not be equity against him."

Since English common law has long afforded a remedy against the Crown for legal claims which would lie against a commoner, there is no historical basis upon which to limit the further development of actions against the government for redress of claims. Holdsworth, supra at 293-296; see also Bouchard, **Government Liability in Tort**, 34 Yale L.J. 1, 2 (1924). To conclude otherwise would, as Holdsworth recognized, effect "an obvious failure of justice." Holdsworth, supra at 294. In this case, application of the doctrine of sovereign immunity, in its aspect as the discretionary function

immunity, imposes the very injustice Holdsworth anticipated.

Because the sovereign immunity doctrine is both harsh in fact and unjust in principle, the doctrine has long been criticized as an unjust anachronism. Holdsworth, supra; Bouchard, supra. Indeed, that the original doctrine appears less harsh than its modern descendent is especially tragic, for the modern doctrine is fundamentally antithetical to our belief that a free citizenry, not a privileged elite, is the true sovereign and that the democratic republic guaranteed by the Constitution must be ultimately accountable to that citizenry. In this connection, the maxim that the king can do no wrong, which reflects one underlying tenet of the immunity, ironically appears to have originally

meant that the king was not privileged to do wrong. Bouchard, supra at 2.

Even if the doctrine of sovereign immunity is too entrenched to be altered without Congressional action, this Court must interpret its scope in the light of its historical origins and the anomaly of its continued viability. Countering the license conferred by the immunity is the more basic principle that justice is best served by the assignment of responsibility for legally cognizable injuries. See Westfall v. Erwin, ___ U.S. ___ (1988).

In this case, petitioners have alleged that the contractors' failure to implement safety measures meeting the mandatory standards for radiation exposure adopted by the government, which failure was not intended to be protected by any governmental immunity, subjected

them or their loved ones to debilitating pain, psychological stress and lingering deaths, a grim reality with which the hibakusha are all too familiar. In the interest of justice, nothing in the doctrine of sovereign immunity, even in its feudal aspect, demands that the government be absolved of responsibility for such conduct.

II. THE LOWER COURTS' APPLICATION OF THE DISCRETIONARY FUNCTION EXCEPTION IS INCONSISTENT WITH ITS INTENDED PURPOSES. PROPERLY CONSTRUED, THE EXCEPTION WOULD NOT IMMUNIZE THE ALLEGED GOVERNMENTAL NEGLIGENCE IN THIS CASE.

The essential purpose of the Federal Tort Claims Act was to broadly waive the government's sovereign immunity and, consistent with the historical limits of the immunity, render the government accountable in tort "in the same manner and to the same extent as a private

individual under like circumstances." 28 U.S.C. §2674; Varig, 467 U.S. 797, 808. As a limited exception to this general principle, the Act establishes an immunity from liability "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty ... whether or not the discretion involved be abused." 28 U.S.C. §2680(a). In Dahelite, 346 U.S. 15, this Court appeared to read the exception broadly to include not only actions involving high level "policy judgment and decision," but also "the acts of subordinates in carrying out the operations of government in accordance with official direction." Id. at 35-36.

Believing that this case was controlled by Dalehite, as ostensibly interpreted by this Court in Varig, both the district court and the Ninth Circuit

held that the discretionary function exception precluded governmental liability for the negligent formulation and implementation of maximum radiation exposure levels in the nuclear weapons testing program. The lower courts, however, have misread the scope and purpose of the discretionary function exception and, in particular, this Court's view of Dalehite expressed in Varig.

Dalehite arose from a disasterous explosion of ammoninum nitrate fertilizer stored in cargo ships awaiting shipment as part of the government's program of rehabilitation of the European and East Pacific war zones following World War II. Plaintiffs charged the government with negligence in the cabinet level decision to initiate the fertilizer delivery project, and in the government's alleged

failures to test the fertilizer for its explosive potential, to develop proper manufacturing plans and to police the dockside storage and loading of the fertilizer. Rejecting petitioners' claims, this Court concluded that the program in its entirety was protected by the discretionary function exception. Observing that the focus of the exception is on the decisions of the "executive or administrator," the Court further concluded that the exception also protected acts, apparently regardless of how ministerial, taken in carrying out the basic policy decision:

> "[T]he 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgement and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the

> operations of government in accordance with official directions cannot be actionable." 346 U.S. at 35-36.

In Varig, 467 U.S. 797, thirty years after Dalehite, this Court sought to clarify the scope of the discretionary function exception to the general principle of liability under the Tort Claims Act. Contrary to the lower courts' apparent understandings in this case, however, while Varig accepted much of Dalehite's analysis of the legislative history of the exception, this Court did not adopt the excessively broad view of the immunity expressed in Dalehite. Thus, while Varig acknowledged that the exception cannot be precisely defined, this Court nonetheless recognized that "it is possible to isolate several factors useful in determining when the acts of a government employee are

protected from liability by §2860(a)." Id. at 813. Observing that the focus of the inquiry is upon the "nature of the conduct, rather than the status of the actor," the Court explained the essential principle informing Congress' recognition of the discretionary function exception:

> "Congress wished to prevent judicial 'second-guessing' legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort. By fashioning an exception for discretionary governmental functions. . . . Congress took 'steps to protect the government from liability that would seriously handicap efficient government operations.'" (Emphasis added.) Id. at 813-814.

Varig, therefore, did not hold or intimate that all lower level actions taken in furtherance or implementation of a discretionary program can also be characterized as discretionary. To the contrary, most lower level actions are

ministerial and are precisely those which may be, and are commonly, tested by a standard of common law negligence. The essential purpose of the Tort Claims Act is to render the government liable as a private person for just such conduct.

In a closely related context, this Court has recently unanimously reaffirmed that federal immunities should not lightly be established and should be narrowly tailored to serve only their legitimate purposes. Westfall v. Erwin, ___ U.S. ___ (1988). Recognizing that the immunities "come at a great cost" and "contravene[] the basic tenet that individuals be held accountable for their wrongful conduct," this Court held that absolute immunity "is justified only when 'the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring

harm to individual citizens." Id., quoting from Doe v. McMillan, 412 U.S. 306, 320 (1973). Specifically, concluding that the challenged conduct of federal officials must be discretionary to be entitled to immunity, this Court observed:

> "The central purpose of official immunity, promoting effective Government, would not be furthered by shielding an official from state-law tort liability without regard to whether the alleged tortious conduct is discretionary in nature. When an official's conduct is not the product of independent judgment, the threat of liability cannot detrimentally inhibit that conduct. It is only when officials exercise decisionmaking discretion that potential liability may shackle 'the fearless, vigorous, and effective administration of policies of government.' Because it would not further effective governance, absolute immunity for non-discretionary functions finds no support in the traditional justification for official immunity." (Emphasis added.) Id., quoting Barr v. Mateo, 360 U.S. 564, 571 (1959).

Furthermore, in rejecting the petitioners' contention that such discretion may be "minimal," this Court also declared:

> "We reject such a wooden interpretation of the discretionary function requirement. Because virtually all official acts involve some modicum of choice, petitioners' reading of the requirement would render it essentially meaningless.... [P]etitioners' approach ignores the balance of potential benefits and costs of absolute immunity under the circumstances and thus loses sight of the underlying purpose of official immunity doctrine. See Doe v. McMillan, 412 U.S., at 320. Conduct by federal officials will often involve the exercise of a modicum of choice and yet be largely unaffected by the prospect of tort liability, making the provision of absolute immunity unnecessary and unwise." Id.

Indeed, this Court has recently granted certiorari to consider the appropriate scope of the discretionary function exception. Berkovitz v. United States, 822 F.2d 1322 (3d Cir. 1987),

cert. granted, 56 U.S.L.W. 3459 (U.S. Jan. 11, 1988) (No. 87-498). In that case, the Third Circuit, relying on an excessively broad view of Varig, held that the exception immunized the alleged negligent licensing of a polio vaccine in violation of FDA regulations requiring the manufacturer to show that the vaccine complied with the regulatory standards. The majority apparently believed that Varig adopted Dalehite's apparent conclusion that all "non-discretionary operational level acts and omissions taken in furtherance of planning level discretionary decisions" were immune. Id. at 1329. As Judge Higgenbotham observed in dissent, by affording immunity to the FDA's implementation of the requirements of its own regulations, the majority "distorts the discretionary function exception" and "expanded the ...

exception beyond the boundaries of any case reported to date." Id. at 1332, 1334.

Wherever the line might be drawn, the allegations in the instant case place liability well outside the protections offended by the limited discretionary function exception. In this case, petitioners do not base their charges on the government's underlying political decision to engage in nuclear weapons testing. Rather, petitioners contend that, even in the light of information then available, the contractors failed to implement the safety measures required to meet the standards for radiation exposure the government adopted for the tests The statutory authorization for the nuclear weapons testing program required the government to establish safe standards for the military. The contractors were

under a mandatory duty to prepare and implement a radiation safety program to assure these standards were met.

These actions cannot properly be construed either to constitute a "social, economic or political policy" decision falling within the discretionary function exception explained in Varig or to involve the "independent judgment" or "decisionmaking discretion" essential to the "fearless, vigorous and effective administration of policies of government" which concerned this Court in Westfall. To do so would allow the exception to swallow the rule in any case where the underlying program was protected by the discretionary function exception. The only reason for the discretionary function immunity is to protect the process by which the basic policy decisions essential to the operation of

government are formulated. In the interest of justice, therefore, those government actions which are not fundamental policy decisions should not be immunized from liability.

The lower courts' reliance on the military commander's hypothetical authority to alter the mandatory standards for maximum radiation exposure is entirely misplaced. Not only is there no evidence that petitioners have challenged any such decision but to protect any such decision would be to immunize intentional experimentation with the lives of the military and civilian participants in the program, their families and perhaps generatons to come. Such experimentation, if it occurred, would be a crime against humanity. United States v. Brandt (The Medical Case), 2 Trials of War Criminals Before

The Nuremberg Military Tribunals Under Control Council Law No. 10, pp. 181-182 (1949); United States v. Stanley, 483 U.S. ___, 97 L.Ed. 2d 550, 569 (O'Connor, J., concurring and dissenting), 570-573 (Brennan, J., dissenting) (1987).

In sum, the discretionary function immunity is and should be a tightly limited exception to the general principle of governmental responsibility and accountability under the Tort Claims Act. This is especially true in our democratic system where the people, not the government, are the true soverigns. Thus, even if the exception has an independent modern rationale, this court must nevertheless recognize that the doctrine also derives from an historical notion of sovereign immunity rooted in a concept of the divine right of kings. As such, the doctrine is inherently inconsistent with

the principles of a democratic republic and should not be extended beyond its limited justification.

III. THE UNITED NATIONS' UNIVERSAL DECLARATION OF HUMAN RIGHTS OBLIGATES THE UNITED STATES TO COMPENSATE THE VICTIMS OF RADIATION EXPOSURE IN OUR NUCLEAR WEAPONS TESTING PROGRAMS.

Article VI, paragraph 2 of the United States Constitution provides that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land . . . ." As such, subject only to constitutional restrictions, a treaty is placed on an equal footing and is of like obligation and dignity as a Congressional enactment, and will supersede all prior inconsistent federal law. Whitney v. Robertson, 124 U.S. 190, 194-195 (1888); Reid v. Covert, 354 U.S. 1, 18 (1957). Although not expressly addressed in the

Constitution, the Supreme Court has also recognized that customary international law "is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination." The Paquete Habana, 175 U.S. 677, 700 (1900). See generally Henkin, **The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny**, 100 Harv. L. Rev. 853, 863-886, 873 ["In the eighty-seven years since **The Paquete Habana**, the Court repeatedly has emphasized that international law is the law of the land, and it has given effect to principles of customary international law as the law of the United States."] (1987).

The Universal Declaration of Human Rights ("Universal Declaration"), adopted by the United Nations, has been recognized to be "the starting point in defining the contemporary context of customary international human rights law." See, e.g., Lillich, **The Role of Domestic Courts in Enforcing International Human Rights Law**, Guide to International Human Rights Practice (U. of Pa. Press 1984). Although the United States, which supported the Universal Declaration, has not characterized it as a treaty, commentators have virtually unanimously recognized that "the Declaration, as an authorizative listing of human rights, has become a basic component of international customary law, binding on all states, not only on members of the United Nations." Sohn, **The New International Law: Protection of**

the Rights of Individuals Rather Than States, 32 Am. U. L.Rev. 1, 17 (1982); Park, **Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation**, 34 UCLA L. Rev. 1195, 1218-1220 (1987); Humphrey, **The International Bill of Rights: Scope and Implementation**, 17 Wm. & Mary L.Rev. 527, 529 (1976). As Professor Humphrey has observed:

> "[T]he adoption of the Declaration may well have been one of the greatest achievements of the United Nations. It provides the framework for the international recognition of those human rights and fundamental freedoms that were left undefined by the Charter. In the tradition of the Magna Carta, the American Declaration of Independence, the French Declaration of the Rights of Man, and other historic statements, the Universal Declaration of Human Rights enshrines on the international level a universally accepted philosophy of freedom for the twentieth century moving beyond the historic declarations by recognizing that civil and political rights can have

> little meaning without economic, social, and cultural rights. Its moral and political authority is equal to that of the Charter itself." Ibid.

The Declaration begins with a proclamation that it constitutes "a common standard of achievement for all people and all nations, to the end that every individual and every organ of society . . . shall strive . . . to promote respect for these rights and freedoms and by all progressive measures, national and international, to secure their universal and effective recognition and observance . . . ." Article III of the Universal Declaration posits that "everyone has the right to life, liberty and security of person." And most importantly, in Article VIII, the Universal Declaration states that "everyone has the right to an effective remedy by the competent national

tribunals for acts violating the fundamental rights granted him by the Constitution or by law."

As a signatory to the Universal Declaration, the United States has recognized and acknowledged the principles it establishes and affirms. As a consequence, the government has, and should have, a responsibility to "respect, promote and observe" its principles "representing the consensus of the international community. . . ." Park, 34 UCLA L.Rev. 1195, 1219; Henkin, 100 Harv. L. Rev. 853, 886.

Significantly, the United States has historically recognized these obligations. In 1956, in an exchange of notes with the Japanese Minister of Foreign Affairs and the American Ambassador, John M. Allison, the United States offered compensation to the Japanese fishermen

who were exposed to nuclear fallout from the tests conducted by the United States in the Marshall Islands. **Exchange of Notes Constituting An Agreement Between The United States of America and Japan Relating to The Settlement of Japanese Claims for Personal and Property Damages Resulting from Nuclear Tests in the Marshall Islands in 1954**, United Nations -- Treaty Series 198 (1955). Expressing the United States' deep concern over the injuries suffered by the Japanese fishermen in the course of the tests, the United States offered, "with reference to the question of legal liability, the sum of two million dollars for purposes of compensation for the injuries or damages sustained as the result of nuclear tests in the Marshall Islands in 1954." (Emphasis added.) Ibid. The offer was made "in full settlement of any and all

claims against the United States of America or its agents, nationals, or juridical entities, on the part of Japan and the nationals and juridical entities for any and all injuries, losses, or damage arising out of the said nuclear tests." Ibid.

Implicit in the government's action in offering compensation to the Japanese victims of the Marshall Island nuclear test was a recognition of their legitimate legal claim under international law for compensation for injuries caused as a result of our nuclear weapons testing program. It would indeed be bitterly ironic if the United States denied compensation to its own citizens for injuries resulting from exposure to nuclear radiation in the same testing programs. The civil, political and human rights recognized in the Universal

Declaration, which scholars and nations have recognized to have assumed the dignity of customary international law, should be applied in this case to recognize petitioners' legitimate claims and to provide compensation for the devastating injuries received as a result of the testing program.

CONCLUSION

The responsibility of our government to redress the injuries suffered by petitioners here lies at the heart of our identity as a free people. The notion that a government should not be held responsible for such injuries, or that a lack of responsibility is necessary to the effective operation of government, is, CABS and FOH respectfully submit, contrary to our most basic values and to the consensus on human rights in the international community. In view of the

historical and international contexts described above, the government's discretionary function exception should be construed narrowly and should not protect the gross negligence in the formulation and implementation of safety guidelines alleged here. CABS and FOH respectfully urge the Court to issue a writ of certiorari to the Ninth Circuit Court of Appeals in order to review and reverse the judgment in this case.

Dated: February __, 1988

Respectfully submitted,

HANSON, BRIDGETT, MARCUS,
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